Permit Reform: Support and Extend Current Efforts

PRELIMINARY DRAFT FOR DISCUSSION ONLY

This preliminary draft discussion paper is a work product developed by the consulting team for review and discussion by the Blue Ribbon Commission on Transportation. The contents are intended to provide the Commission members with factual background information and a balanced set of policy alternatives, including the pros and cons of these alternatives. This paper is one of a series and should be reviewed in the context of the entire series that, when taken together, presents a comprehensive overview of the state's transportation system.

This discussion paper has been prepared primarily for Blue Ribbon Commission members new to these issues who wish to engage in a fundamental debate and for a more general audience of interested citizens who may wish to comment on the Commission's deliberations. This paper is intended to be provocative and to stimulate discussion of issues and options in this state. It questions the current ways of doing business, not for the sake of finding fault, but to allow consideration of other potential ways of thinking about transportation issues that might be appropriate in the future.

PROBLEM STATEMENT

Over the last three decades, federal, state, and local governments have passed a number of laws to address a range of environmental problems, provide for citizen involvement in decisionmaking, and manage growth and land use. These laws, and the regulations implementing them, have resulted in significant environmental improvements in Washington State and nationwide. However, the sheer number as well as the complexity of these laws, Executive Orders, regulations, permit requirements, and appeals processes create the potential for conflicts and inconsistencies among agencies and programs and can result in project delays. Public and private project developers seeking permits as well as members of the public perceive that inconsistencies, confusion, and even potential contradictions among the various laws and regulations are common.

Multiple, Overlapping Laws

As Table 1 illustrates, numerous legal requirements at the federal, state, and local level can affect transportation projects. This section and the table do not provide a comprehensive list of all the relevant requirements, but they highlight the magnitude and complexity of the many statutes, executive orders, regulations, ordinances, and permits that planners, designers, and builders may need to consider in developing transportation projects. The Administration Committee's background paper on Governance Structures includes further discussion of various laws, agencies, and authorities involved in transportation decisionmaking in Washington State.

Federal Laws

At the federal level, the National Environmental Policy Act (NEPA), the Federal Water Pollution Control Act, the Clean Air Act, the Endangered Species Act (ESA), and dozens of other laws, Executive Orders, tribal treaties, and regulations affect the development of proposed transportation projects. In the coming years, the ESA is expected to have significant effects on land use and the regulatory system in Washington, particularly as listings for various salmon stocks take effect in areas throughout the state. For example, in March 1999, the National Marine Fisheries Service listed chinook salmon in Puget Sound as a threatened species and spring-run chinook in the upper Columbia River as endangered. The effects of these listings on transportation projects in Washington remains to be seen, but the Endangered Species Act is expected to create an additional layer of review for proposed projects.

Washington State Laws

At the state level, three major environmental laws affect proposed land use and transportation projects: the State Environmental Policy Act (SEPA) and the Shoreline Management Act (SMA), both adopted in the early 1970s; and the Growth Management Act (GMA), enacted in two steps in 1990 and 1991. SEPA was modeled after the federal National Environmental Policy Act, and it applies to actions of all levels of government that have the potential to affect the environment adversely. Adopted in a statewide vote, SMA requires cities and counties to adopt shoreline master programs and regularly update these plans. Some critics complain about the procedural requirements of SEPA and SMA, but few dispute their goals of informing policymakers about the environmental impacts of their decisions and of protecting the state's shorelines. GMA requires counties and cities to adopt comprehensive plans and development regulations to plan for and address the impacts of growth. The Administration Committee's background paper on Governance Structures and the Investment Strategies Committee's paper on Land Use and Transportation provide more information on Washington's Growth Management Act and how it influences transportation planning in the state. In addition, more than a dozen other Washington State laws and Executive Orders of the Governor create additional requirements that affect transportation projects.

Local Ordinances

Local governments also have decisionmaking authority over transportation projects through the review and issuance of permits for building, grading, clearing, shoreline development, conditional use, and water rights. Under the state's Growth Management Act, local jurisdictions also adopt comprehensive plans, development regulations, and ordinances to protect critical areas.

Disconnect between Planning and Environmental Review

The process of developing Environmental Impact Statements for proposed projects, as the National Environmental Policy Act and State Environmental Policy Act require, can conflict with local processes for planning projects. Local planning efforts – such as corridor studies, route development studies, and other planning studies – typically occur before undertaking an EIS process. These planning efforts usually entail public involvement, traffic analysis, and analysis of alternatives to determine a preferred alternative. However, the EIS process also requires additional consideration of alternatives, public involvement, and a statement of the purpose and need for the project before the preferred alternative is selected and design work begins.

Table 1. Examples of Federal, State, and Local Requirements Affecting Transportation Projects

Federal Laws

- Archeological Resources Protection Act
- Clean Air Act
- Coastal Zone Management Act
- Comprehensive Environmental Response, Compensation, and Liability Act
- Endangered Species Act
- Estuary Protection Act
- Executive Orders
- Farmlands Protection Policy Act
- Federal Insecticide, Fungicide, and Rodenticide Act
- Fish and Wildlife Act
- Land and Water Conservation Fund Act
- Migratory Bird Conservation Act
- National Environmental Policy Act
- National Historic Preservation Act
- Rivers and Harbors Act
- Safe Drinking Water Act
- Surface Transportation and Uniform Relocation Assistance Act
- Tribal Treaties
- Uniform Relocation and Real Property Acquisition Policies Act
- Water Pollution Control Act
- Watershed Protection and Flood Prevention Act
- Wild and Scenic Rivers Act

Washington State Laws

- Abandoned and Historic Cemeteries Act
- Archeological Sites and Resources Act
- Clean Air Washington Act
- Commute Trip Reduction Act
- Flood Control Zone Act
- Forest Practices Act
- Governor's Executive Orders
- Growth Management Act
- Hazardous Waste Management Act
- Indian Graves and Records Act
- Model Toxics Control Act
- Shoreline Management Act
- Waste Reduction Act
- Water Pollution Control Act

Local Regulations

- Building Permit
- Clearing Permit
- Conditional Use Permit
- Critical Areas Ordinances (per Growth Management Act)
- Grading Permit
- Shoreline Substantial Development Permit
- Water Rights Permit

Criticisms of the Current Process

Some critics of the current system argue that environmental issues are considered too late in the decisionmaking process. They feel that EISs typically require unnecessary amounts of detail and that they focus on the process rather than the outcome. The EIS process is also criticized as being duplicative, inefficient, overly complex, and burdensome. Though the EIS process is intended to incorporate public comments and provide a way to evaluate various alternatives to determine the most appropriate option, a common criticism is that decisions are perceived as being predetermined, with the EIS used to justify a choice that has already been made.

These problems with the current EIS and permitting process can result in a range of adverse consequences for projects. They can lead to increased costs as well as negative impacts to natural resources as projects are delayed. The process strains often-limited agency resources, can damage relationships, and often results in poor perceptions in the eyes of the public. Despite the reams of data an EIS may entail, decisions may still be based on inadequate information. Finally, the many requirements of the EIS process, coupled with the numerous permits that are often required for transportation projects, can result in significant delays in project delivery.

PROPOSED SOLUTION: ENDORSE & EXTEND CURRENT REFORMS

The Washington State Department of Transportation and other government agencies in Washington State are currently undertaking a number of significant efforts to improve the process for moving transportation projects from the drawing boards to on-the-ground results. WSDOT's "Reinventing NEPA" pilot project and other efforts are taking important steps

towards improving the planning and permission granting process for transportation projects in Washington.

The Blue Ribbon Commission on Transportation should consider endorsing the most promising of these current efforts and urging WSDOT and other agencies to continue and expand their reform efforts in these areas, including the following efforts:

- Better integration of planning and NEPA/SEPA EIS process.
- Early engagement of stakeholders to help reach solid decisions.
- Capital coordination for environmental mitigation projects.
- Watershed-based planning and mitigation, including GIS maps.
- Funding staff in resource agencies to review permit applications.
- Using pilot projects to test and promote potential reforms.
- Minor changes in statutes and regulations that support reform efforts.

Background and Rationale

Washington's Previous Reform Efforts

In the last ten years, Washington State has undertaken four major reviews of its governance, growth management, land use, and environmental policies: the Local Governance Study Commission (1988), the Growth Strategies Commission (1989-1990), the Governor's Task Force on Regulatory Reform (1993-1994), and the Land Use Study Commission (1996-1998). An additional related effort relevant to the transportation sector is the Legislative Transportation Committee's 1994 Environmental Cost Savings and Permit Coordination Study. These efforts have led to changes in the legal and regulatory system governing land use and environmental protection in Washington State.

GROWTH STRATEGIES AND REGULATORY REFORM

Governor Booth Gardner's Growth Strategies Commission addressed comprehensive plans and development regulations for Washington's cities and counties. The Legislature enacted many of the Commission's recommendations as part of the Growth Management Act in the early 1990s. In 1993, Governor Mike Lowry appointed a Task Force on Regulatory Reform to consider remaining land use issues that GMA did not resolve. The Task Force focused on integrating environmental and growth management laws and on reforming the permit and appeal processes. The Legislature passed many of its recommendations in 1995 as part of Engrossed Substitute House Bill 1724, which modified local government procedures and sought to begin to integrate the SEPA, SMA, and GMA laws.

LAND USE STUDY COMMISSION

The Land Use Study Commission completed its work at the end of 1998. The Commission found that a consolidated land use code for the state could have significant benefits, but statewide consensus for the adoption and implementation of such a code is not currently present. The Commission's report contains a number of recommendations in the following topic areas: governance, planning, environmental review and permitting, essential public facilities, appeals and judicial review, enforcement, vesting, and funding.

ENVIRONMENTAL COST SAVINGS AND PERMIT COORDINATION

In 1994, the Legislature passed the Supplemental Transportation Budget (Engrossed Substitute House Bill 6084), a section of which directed the Legislative Transportation Committee to investigate methods of reducing the costs that WSDOT, cities, and counties incurred in providing environmental protection and mitigation for transportation construction and maintenance. The LTC worked with a consultant team, WSDOT, and other agencies and jurisdictions to develop a report with 36 recommendations for reducing these costs. The report included recommendations on the following topics: interagency coordination; interagency cross-training; alternative dispute resolution; WSDOT research projects; regional resource management; wetlands; stormwater management; environmental mitigation/retrofit/enhancement; data management; consistent, predictable environmental standards; multi-jurisdictional mitigation project opportunities; integrating project and environmental considerations in the project development process; and the permit process.

The Committee published its report, Environmental Cost Savings and Permit Coordination Study, in December 1994, and WSDOT has made significant progress in implementing its recommendations in the subsequent years. The Department of Transportation Highways and Rail Programs Performance Audit that Cambridge Systematics prepared for the Joint Legislative Audit and Review Committee (JLARC) supports this conclusion. The report found that WSDOT had made progress on the 16 recommendations for which the agency had lead responsibility.

Current Reform Efforts at WSDOT

WSDOT's current efforts to improve the planning and permitting process are intended to result in the following improvements: reduced costs, enhanced environmental protection, better project delivery, better informed decisionmaking, improved relationships, process efficiency, and decisions that "stick" – that is, they are not second-guessed or overturned at subsequent stages in the decisionmaking process.

SR-104 PILOT PROJECT: REINVENTING NEPA

WSDOT is currently undertaking a pilot effort to apply the agency's ideas for reforming the decisionmaking process for transportation projects. The pilot project involves a segment of State Route 104, stretching from the interchange with Highway 101 to the Kingston ferry terminal on the Kitsap Peninsula. The new pilot decisionmaking structure that WSDOT centers around a Steering Committee consisting of transportation agencies, resource agencies, local agencies, tribal governments, other groups, and the general public. This process and structure are intended to achieve "buy-in" to decisions at an earlier stage in the decisionmaking, rather than having resource agency staff or others raise new issues, concerns, or lawsuits after substantial time and resources have been invested in the project.

Throughout the process, the Steering Committee interacts with the project management team at WSDOT and the Federal Highway Administration as well as other transportation decisionmakers in federal agencies. All members of the Steering Committee have equal standing, and they are empowered to make decisions on behalf of the agencies or groups that they represent. Committee members are supposed to act as team players, working together to find solutions and reach consensus. Improved technical tools, limited public resources, and broader current efforts to "reinvent" government and find sustainable solutions have all helped make this pilot effort possible at the present time. The federal agencies involved in implementing the National

Environmental Policy Act have taken a direct interest in WSDOT's current efforts and are considering the pilot project as a potential way to change the way NEPA works nationwide.

WATERSHED APPROACH

In its environmental mitigation efforts, WSDOT is also making changes in the way it conducts its work. The agency is working to shift from considering environmental issues on a project-by-project basis to develop a more holistic, watershed-based strategy for environmental mitigation. To facilitate this effort, WSDOT's Environmental Affairs Office is developing a geographic information system (GIS) of Washington State and its watersheds. WSDOT is working to create an overall program of watershed management that integrates its environmental programs and decisionmaking in a range of areas, including wetlands, flood management, stormwater, hazardous waste, aquatic sediments, fish and wildlife, erosion control, and stream restoration.

CAPITAL COORDINATION OF ENVIRONMENTAL MITIGATION

In addition to integrating the agency's own environmental programs, WSDOT is working to coordinate its mitigation efforts with those of other state agencies, federal agencies, and nongovernmental organizations to develop comprehensive watershed management strategies. WSDOT's significant resources for environmental projects ($80-110 million annually) have helped facilitate the agency's role in working with resource agencies and other organizations on environmental efforts. Substitute Senate Bill 6063, regarding capital budget coordination, codified this partnership among WSDOT and the Departments of Ecology; Natural Resources; Community, Trade, and Economic Development; Fish and Wildlife; two commissions, and an interagency committee.

In its capital project coordination efforts, WSDOT employs the GIS maps the agency is developing of the state's watersheds. The GIS system includes many recommendations for environmental mitigation and enhancement projects drawn from plans that organizations such as the Washington Department of Ecology, the U.S. Environmental Protection Agency, cities, counties, and private not-for-profit organizations have developed. Watershed maps are linked to an annotated bibliography of plans for environmental efforts in the area as well as a list of specific project recommendations designed to preserve, mitigate, enhance, and/or restore fish habitat, water quality, and/or wetlands. The resulting GIS maps contain information on wetland restoration projects, barriers to fish passage (those under WSDOT authority as well as local ones), WSDOT stormwater outfalls, habitat preservation and restoration projects, as well as natural features, political boundaries, and state routes. WSDOT can use these maps to determine the most cost-effective and environmentally beneficial ways to conduct its mitigation efforts, regardless of whether the proposed projects lie in WSDOT's right-of-way or are under the jurisdiction of other agencies or local jurisdictions.

ENDANGERED SPECIES CONCERNS

Prior to the recent listing of several Washington State salmon runs under the federal Endangered Species Act, WSDOT has been working to develop similar coordinated efforts to prepare for the listings. The Endangered Species Act affects WSDOT's activities in several ways. Many state highway projects are implemented using federal funds, and Section 7 of the ESA requires that any activity authorized, funded, or executed by a federal agency must not jeopardize listed species. In the past, WSDOT has traditionally dealt with endangered species on a project-by-project basis, focusing reactively on compliance with the law and obtaining the necessary permits. Currently, however, the agency is trying to shift its perspective to a more proactive and

comprehensive approach. By considering endangered species issues on a program-wide level, rather than by project, WSDOT can coordinate its work more effectively, apply standardized conservation measures, and minimize overall impacts. The agency has also incorporated endangered species information into its GIS system, which enables planners to determine quickly if proposed transportation projects are likely to affect any threatened, endangered, and candidate species.

WSDOT is using these tools in its efforts to obtain programmatic ESA permits for its transportation program from the U.S. Fish and Wildlife Service and the National Marine Fisheries Service, rather than detailed permits for each individual project. However, WSDOT has encountered some difficulties at the federal level due to funding and staff shortages in the agencies that grant permits under the Endangered Species Act. Accordingly, WSDOT is working with the Federal Highway Administration to fund additional staff in the resource agencies; the new staff will be dedicated to reviewing WSDOT's permit applications. This approach, supported with Transportation Enhancement funds granted under the Transportation Efficiency Act for the 21st Century (TEA-21), is intended to expedite review of transportation projects while promoting the protection of listed species.

Other Current Wetlands Reform Efforts

Significant changes are currently underway in the way that federal, state, and local governments manage wetlands protection efforts. Until recently, different agencies operating in Washington State used different definitions for identifying wetlands, resulting in inconsistent enforcement. Now a number of agencies have agreed to use the same definition of wetlands, and four federal agencies as well as the Washington Department of Ecology and the Department of Fish and Wildlife have signed memoranda of understanding to that effect.

Interagency Agreements

Interagency agreements at the federal, state, and local government level can be used to enable decisionmakers to reach early agreements on alternatives and avoid having those decisions reconsidered at a later date. The agreements also provide for negotiated schedules for reviewing proposed projects, and they determine the appropriate level of detail for each stage in the review process. Such an arrangement is intended to avoid having to provide excessive information at early stages in a project when it may not be truly necessary for decisionmaking. These agreements can assign and fund designated staff within regulatory agencies for reviewing proposed projects. Interagency agreements can also contain provisions for assigning "consequences" – that is, what happens if agencies do not meet their obligations as assigned in the scope of the initial agreement. Establishing such interagency memoranda of understanding or agreement early in the decisionmaking process can increase certainty and save time later in the process.

Minor Statutory "Fixes" to Support Reform Efforts

Several relatively small changes to existing statutes could make significant differences in improving the permitting process for transportation projects in Washington State. First, the Legislature could provide statutory authority under the State Environmental Policy Act (SEPA) that designates the lead agency under SEPA to establish a schedule for preparation, review, and comment by other state and local agencies. The Legislature could also provide authority for lead agencies to ignore (without the threat of a lawsuit) comments from agencies that are not received in a timely manner, based on the established schedule. In particular, this provision would help

prevent public agencies from entering late in the process and reopening decisions upon which other participants have already agreed, though such a rule could also apply to outside individuals and groups. A third proposal involves standardizing at the state and local level the current procedures for providing public notice regarding proposed projects. Currently, the large number of different notification requirements provides significant opportunities for litigation based on relatively minor procedural lapses. Many individual laws have their own procedures for notification because they were enacted at different times. However, these procedures could be simplified in a smaller array of options, which could improve the process without compromising the information provided to the public and the public's ability to give input on projects.

PERFORMANCE ON EVALUATIVE CRITERIA

The Administration Committee has created four criteria for evaluating proposed solutions to the current problems with the planning and permission granting process for transportation projects. The criteria are as follows:

1. Helps make decisions that stick.
2. Reduces permitting costs.
3. Reduces time for permitting process.
4. Reduces environmental impacts through better decisionmaking.

The Administration Committee's criteria are consistent with the criteria that WSDOT developed for its Reinventing NEPA efforts, as discussed in the section above on Current Reform Efforts at WSDOT.

The reform efforts described in this background paper generally satisfy the Administration Committee's four criteria. However, these are only pilot projects. The efforts have not been applied universally; therefore, their scope is limited. To broaden the effects of these reforms, the Administration Committee could recommend that the Legislature and WSDOT expand the agency's current efforts beyond the existing pilot projects.

Helps Make Decisions that Stick

Involving stakeholders earlier in the decisionmaking process, as WSDOT is doing with its SR-104 pilot project, is intended to help reach decisions that stand and are not revisited at later stages in the process. The participants in the process are also empowered to make decisions on behalf of the agencies or organizations that they represent, rather than passing responsibility or delaying decisions. Efforts to gather information proactively, such as WSDOT's GIS maps of environmental data, can help make decisions stand because new information is less likely to emerge late in the decisionmaking process. It is critical to recognize, however, that such maps are only as good as the data they contain, and they require frequent updates to serve as an appropriate basis for decisions.

Reduces Permitting Costs

By reducing the length of the planning and permitting processes, these reform efforts should also save permitting costs. Additionally, WSDOT's efforts to craft decisions that stick should reduce the likelihood of lawsuits or other challenges late in the decisionmaking process, which should also save money. Efforts to coordinate capital projects for environmental mitigation with other

resource agencies and organizations should make these efforts both more cost-effective as well as better for the environment.

Reduces Time for Permitting Process

Involving more stakeholders in the decisionmaking process may take more time up front, but it is designed to save time overall and result in better decisions. Reducing the likelihood of lawsuits or other reopenings of decisions that have already been made should reduce permitting and planning time. Gathering data proactively and assembling it in a useful watershed-based format, such as WSDOT's GIS system, should also save time in the permitting process. Additionally, WSDOT's effort to obtain programmatic permits under the Endangered Species Act for its transportation projects should also reduce the time needed to obtain permissions for individual projects in the future.

Reduces Environmental Impacts with Better Decisionmaking

WSDOT's efforts to change the decisionmaking process are designed to produce better decisions for the environment as well as for transportation. Programmatic permits under the Endangered Species Act, watershed-based planning, capital coordination of environmental mitigation projects, and other efforts to view environmental concerns holistically, rather than in a piecemeal, project-by-project, site-by-site manner, are intended to result in more effective decisions that are better for the environment.

AREAS OF UNCERTAINTY AND DEBATE

The reforms discussed in the preceding paper represent a significant advancement beyond the status quo. However, they remain incremental in nature. The Commission's scope of work does not include a wholesale review and revision of existing environmental and land use laws. Its charter does not preclude the Blue Ribbon Commission from considering ambitious reforms, but members should make such decisions in light of previous efforts, including the recent Land Use Study Commission that concluded its work in December 1998.

Issues relating to environmental protection and the regulations intended to help achieve this goal pose challenges for transportation projects. The laws that complicate the process of carrying out transportation projects were enacted over a series of years to address a variety of problems and needs. Though the cumulative impacts of these many laws may be problematic at times, reformers should take care not to destroy the good along with the bad. Most Washingtonians are supportive of the need for environmental protection laws, though they may oppose regulations that they perceive as unnecessarily burdensome, costly, duplicate, or unneeded. In recent years, citizens in Washington and around the nation have not favored attempts to roll back environmental safeguards. Accordingly, the criterion of improving environmental protection is particularly important to consider while seeking solutions that save time and money and help make decisions that stick.

As a society, we have objectives and values that are sometimes seemingly in conflict. Most people desire an efficient, effective transportation system, and they also generally want to protect the state's natural environment and wildlife. Accordingly, for its recommendations to be acceptable and feasible, the Blue Ribbon Commission needs to find ways to improve the transportation system without significantly degrading the natural environment.